direction, and so are much less likely to be sources of interference to neighboring BTAs. Hence, the stability requirement would serve relatively little purpose at 31 GHz.

Finally, the Second Report and Order cannot lawfully impose a new stability requirement at 31 GHz because the Commission never published an appropriate proposal for notice and comment, as required under the Administrative Procedure Act.[71] The Commission proposed a 0.001% requirement in July 1995, fully a year before the first indication that it might allocate the 31 GHz band to LMDS.[72] And when the Commission later suggested adding 31 GHz to LMDS, it expressly declined to address issues relating to the technical requirements proposed in the Third Notice, such as the 0.001% requirement.[73] As a result, the proposal to subject the 31 GHz band to a 0.001% stability requirement has never been before the public, and so cannot now be adopted as a rule. The Third Notice stated, "We believe that this [0.001%] frequency stability . . . can be achieved without significant costs. We request comment on these proposals."[74] As shown above, this stability in fact cannot be achieved at 31 GHz without significant costs — but the public never had an opportunity to say so.

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[71] "General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include — . . . (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

[72] Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules for LMDS, 11 FCC Rcd 53, 98 (1995) (Third Notice of Proposed Rulemaking and Supplemental Tentative Decision), *cited in* Second Report and Order at ¶ 285.

[73] "While we do not address generally those issues relating to LMDS service rules, licensing policies or technical requirements raised in the *Third NPRM*, we seek comment on how to assign this additional spectrum [at 31 GHz] to LMDS entities." Fourth Notice at ¶ 101.

[74] Third Notice, 11FCC Rcd 53 at 98.

The courts have long held that "[a]n unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated. Interested parties cannot be expected to divine the [agency]'s unspoken thoughts."[75] Nor can the imposition of technical rules proposed for other bands be considered a "logical outgrowth" at 31 GHz, inasmuch as the Commission expressly disclaimed consideration of the issue in the Fourth Notice.[76] The Commission therefore must rescind the 0.001% stability requirement. Better, the Commission can decide on the record before it that this requirement is not in the public interest, and abandon it forthwith.

In the alternative, the Commission should postpone the 0.001% requirement as to the 31 GHz outer sub-bands for two years. This will enable 31 GHz users to build out at least part of their planned systems with affordable equipment. And, realistically, even if the tighter requirement were ultimately to serve a useful purpose in minimizing interference across BTA boundaries, it is unlikely to be needed for at least two years.

CONCLUSION

The Commission made a sound decision to allocate to LMDS the middle sub-band at 31 GHz. That compensates LMDS for the 150 MHz in which it is restricted to hub-to-subscriber transmissions, and thus restores to LMDS the full 1,000 MHz of unencumbered spectrum that was planned for this service from the beginning.

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[75] Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991), *citing* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 548-49 (D.C. Cir. 1983). *See also* American Federation of Labor v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1984).

[76] Fourth Notice at ¶ 101.

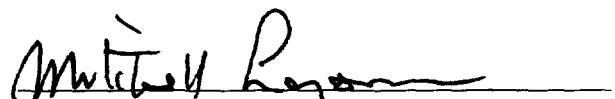
But the Commission should reconsider its decision to allocate the outer sub-bands to LMDS. That decision would give LMDS fully 1,150 MHz of unencumbered spectrum, plus another 150 MHz suitable for hub-to-subscriber use. There is nothing in the record (other than unsupported assertions) to suggest that 1,150 MHz of unencumbered spectrum would make LMDS services more valuable or attractive to the public than 1,000 MHz. But the record does show in concrete and specific terms that point-to-point use of the 31 GHz band is growing fast and is very much in the public interest. Although 31 GHz applications got off to a slow start, because of high equipment costs initially, usage has spread rapidly. In the years before the Fourth Notice, growth figures were climbing exponentially. And there can be no serious question that these applications are in the public interest. Most users are schools, hospitals, and local governmental entities. The most common single application is traffic control, and many localities report they have no suitable alternative to 31 GHz for this purpose. The Commission cannot rationally subordinate this proven need to the speculative improvements that LMDS might gain from a small increment of additional spectrum.

If the Commission does not reconsider allocating the outer sub-bands to LMDS, it should at least reinstate and protect the applications pending at the time the Second Report and Order was released. The "notice" provided by the Fourth Notice was effectively zero, because the Commission ultimately dismissed all applications filed after the Fourth Notice. And the public interest in minimizing the number of licenses that LMDS must protect, in this small amount of spectrum, is far outweighed by the public need for these services.

Finally, the frequency tolerance specified in the Second Report and Order should not be applied to 31 GHz This issue is moot if the Commission reconsiders the allocation to LMDS. If

the Commission reinstates the pending applications, the applicants should be subject to the rules in effect when they applied. And the requirement for tighter frequency tolerance will prevent public safety agencies from operating affordably even if they can reach agreement with the BTA licensee. In any event, the tighter frequency tolerance does not serve even a theoretical purpose except within 20 km of the BTA boundary, and even there is of negligible practical benefit.

Respectfully submitted,



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May 5, 1997

CERTIFICATE OF SERVICE

I, Mitchell Lazarus, do hereby certify that on this 5th day of May, 1997, I have caused copies of the foregoing Petition for Partial Reconsideration of Sierra Digital Communications, Inc. to be served by hand upon the following:

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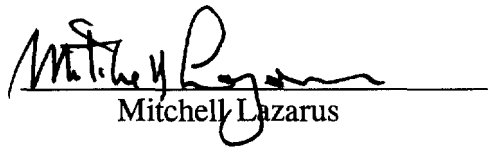

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